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# State - Federal Relations in the Siting of Nuclear Power Plants: Towards Greater State Authority

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The Law of the Sea: International  
Law Implications of the U.S.  
Refusal to sign the Treaty

by

Richard D. Coogan

A paper submitted to the Department of Marine Affairs in  
partial satisfaction of the requirements of Marine Affairs  
Seminar GMA 652.

*Richard D. Coogan* 13 May 1983  
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## Abstract of

### The Law of the Sea: International Law Implications of the U.S. Refusal to Sign the Treaty

This study is undertaken to show the impact of the international law aspects of the Law of the Sea Treaty as they relate to the U.S. failure to sign the Treaty.

The U.S. has embarked on a course of action, by its refusal to sign the Treaty, that can have major impact on day-to-day national policy issues as they relate to international law governing a state's behavior. This behavior specially relates to the right of unhindered passage of ships and aircraft through straits, and the future of the U.S. deep seabed mining as a unilateral undertaking.

In considering the impact of the Treaty on the U.S. we note three types of provisions contained in the document; those that simply codify existing customary practice; those not reflecting customary international law as yet; and those that require specific adherence by those wishing to take advantage of them and who have formally agreed to the arrangements.

The U.S., in refusing to sign the Treaty because of the deep seabed provisions, and yet claiming other

provisions as reflecting customary law, is probably correct as viewed in today's realities.

The U.S. is acting in its own best interests in refusing to sign based totally on the deep seabed provisions of the Treaty.

## PREFACE

Several sources quoted in this paper are indicated as unpublished material and were provided to me by Professor Jon Jacobsen who occupies the Stockton Chair of International Law at the U.S. Naval War College. These sources are papers delivered by the indicated person, at various meetings or professional conferences which have relevance to the subject of this paper.

Professor Jacobsen also assisted me early in my interest in this topic, by providing a general outline for consideration in developing my ideas on how to approach this difficult subject.

All of the "How To" manuals for writers say you ordinarily do not acknowledge the research advisor, I, however, discard this advice. I wish to thank Professor Juda for the sound advice provided on managing the scope of my project and the encouragement he gave on undertaking this task.

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## CHAPTER I

### The U.S. Rejection of the Law of the Sea Treaty: The Current status of the U.S. Rejection of the Treaty.

Fifteen years after Ambassador Arvid Pardo's UN General Assembly speech initiated the Third United Nations Conference on the Law of the Sea, the completed Convention was opened for signature on December 6-10, 1982, at Montego Bay, Jamaica. At a September meeting of the same year, the Conference in New York City cleared the way for this signing.

There is little doubt that the Convention, which was adopted on April 30, 1982, by a vote of 130 in favor to 4 against--which included the United States--with 17 abstentions, will enter into force sometime within the next decade; only 60 state ratifications are required to achieve this. Two states, the Soviet Union and France, both pioneer deep sea mining states, have committed themselves to the Treaty.

President Reagan announced on July 9, 1982, that the U.S. would withhold signature of the Convention, as it was adopted, due to certain reservations concerning the deep sea mining text. He did, however, declare that, "Those extensive parts dealing with navigation and overflight and most other provisions of the Convention are consistent with United States interests and, in our view, serve well the interests of all nations."<sup>1</sup>

It could be possible for the U.S. objections to the provisions on deep sea mining to be met through actual improvements in the textual language at the meetings scheduled to take place beginning in March 1983 when the Preparatory Commission meets. The U.S. is allowed to attend these meetings as an observer but without a vote. President Reagan has decided, however, not to send an observer. This means that the opportunity to influence the regulations adopted by the Prep-Com will be lost, and the United States will be outside, not only the mining issues but on all the other aspects of ocean law covered by the comprehensive treaty.

Since President Reagan's pronouncements regarding the Treaty, several initiatives to pursue U.S. ocean interests outside the treaty framework have come from various members of Congress. On September 30, 1982, Congressmen Beaux and Forsythe introduced legislation proposing a 200-mile Exclusive Economic Zone (EEZ) off the United States. Senator Stevens has introduced a similar measure in the Senate. In addition, there had been widespread rumors that the President may issue a Proclamation claiming an EEZ in early 1983.<sup>2</sup>

On March 10, 1983, President Reagan laid claim to a 200-nautical mile exclusive economic zone off the shores of all U.S. territory and possessions.



The proclamation stakes out U.S. rights to explore and mine all minerals in the zone, including oil and gas. The proclamation took effect immediately. The chief impact will be to protect U.S. rights to the mining of minerals.<sup>3</sup>

While the measure maintains that U.S. rights will be asserted consistently with internationally recognized freedoms of the high seas, there is no clear stipulation as to what these are in the view of the United States and whose determination of these freedoms will be binding on the United States.

Just how has the United States arrived at this difficult point in relation to the Law of the Sea Treaty?

The following chapters will develop a brief history of the trends in the law of the sea; outline the role that the U.S. played in getting the Law of the Sea Treaty where it is today; describe the U.S. interests in the Treaty, and discuss U.S. nonparticipation realities from an international law point of view.

## CHAPTER II

Brief History of how the U.S. Arrived at  
Present Impasse with the Law of the Sea Treaty.

Pre-1945: The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests of all people in the use and enjoyment of the ocean, and rejecting all claims of special interests that would circumvent the general interest of states.<sup>1</sup>

The concept of freedom of the sea evolved as a reaction against the broad claims to territorial sovereignty over vast sea areas put forward by Spain, Portugal, England and other states in the sixteenth and seventeenth centuries. The object of these claims was to monopolize fisheries, and trade with areas thought particularly rich in resources. Grotius and his successors entered the problem in behalf of their own states' unilateral claims to navigate, trade and to utilize the resources of the sea.<sup>2</sup>

Grotius and his contemporaries were motivated by practical considerations, unlike the early Roman jurists who had dealt principally with theoretical concept. In his classic, Mare Liberum, Grotius upheld Dutch trading and navigation rights in the Indies and challenged Portuguese claims and the Papal right to grant title to the sea.

The cultural thesis of Grotius was that the sea was free for all, and that no one could gain ownership of a

property by possession without occupation. The implication is that if the ocean cannot be occupied effectively, it is res communis, it "belongs to no one and open equally to all."<sup>3</sup> Yet he excepted the belt of sea "visible from shore" from the compelling arguments by which he establishes the doctrine of "Freedom of the Seas."

Grotius' views were attacked by many other authors. One of his most distinguished adversaries was an Englishman, John Selden. In 1618, Selden replied with his Mare Clausum (the closed sea) controverting theories of natural law with the fact that parts of the sea had actually been appropriated by England. In the eighteenth century, however, Grotius' Mare Liberum gradually gained support from other writers. Notable among them was another Dutchman, Cornelius von Bynkershoek, whose The Dominio Maris Dissertatio (Freedom of the Seas) was published in 1703.<sup>4</sup>

As a result of the publication of Bynkershoek's work at the beginning of the 18th Century, the question of the appropriation of the sea opened another debate. Bynkershoek was concerned in his Freedom of the Seas with the question of delimitation of the territorial sea immediately adjacent to the coast. He recognized the fact that the seas could be effectively occupied to the maritime belt measured by the range of a cannon shot.



Bynkershoek assigned the dominion of the adjacent sea (Marc Proximum) to the neighboring state within the range of a cannon shot. Marginal waters were thus subject to possession, to occupation and, therefore, to ownership. This extension of the sovereignty of a state beyond the limits of its land territory is based today on the principle that the territorial sovereign has a right to control its own territory and to protect its interests by controlling the waters adjacent to its sovereignty.<sup>5</sup>

In 1783 Secretary of State Jefferson, in diplomatic correspondence, noted that the limit which had gained recognition among nations was the maximum range of a cannon ball. Thereafter the United States recognized the sea league, or "Three geographical miles" as its territorial sea.<sup>6</sup>

From the time of Grotius into the present century, the free use of the seas by ships of all countries has developed into an internationally accepted principle. Inherent in that principle, and developing as a matter of customary practice, is the right of ships to pass through the territorial waters of foreign countries without interference by, or subjection to the jurisdiction of, the littoral state. Although the concept of innocent passage is universally accepted as an abstract principle, the practice of states

has not been uniform, and disagreements exist today as to the implementation thereof.

McDougal and Reisman sum up the concept of freedom of the seas by stating:

"Freedom of the sea" is, thus, no absolute, and never has been. It is, as it was in the beginning, a legal conclusion invoked to justify a policy preference for certain unilateral assertions as against others. The claims it favors are those to the utmost freedom for navigation, fishing, and other pursuits thought to further the most productive use of the sea and its resources, and thus to promote the community interest. It combats monopolistic claims, and minimizes international friction by confining each state's regulatory power, where possible, to ships flying its own flag, thus avoiding wrangles over seizure of ships, and crews and other incidents of enforcement.

For approximately 300 years prior to 1945 the dominant Western colonial powers considered the world ocean to be divided into two basic zones. The first zone was that of the territorial sea, a narrow band of water along the coasts of each country within which that country could exercise sovereignty. Every other nation's surface vessels had the right of innocent passage so long as the passage was not prejudicial to the peace, good order or security of the coastal state. Up until the mid-20th century the maximum breadth of the territorial sea was generally considered to be three nautical miles.

The second zone consisted of the vast majority of the ocean outside of the territorial sea and was commonly

referred to as the "high seas" where freedom of the seas reigned and these seas were not subject nor subjectable to any nation's sovereignty.

Post-1945: With few exceptions the world, until 1945, accepted the fact that a nation's territorial jurisdiction over adjacent sea areas should be quite limited. The three-mile territorial sea prevailed. In 1945, however, President Truman, by proclamation, set in motion a policy which precipitated significant changes.<sup>8</sup> While avoiding a strictly territorial claim the Truman Proclamation did assert United States jurisdiction and control of the natural resources and the subsoil and sea bed of the continental shelf contiguous to the United States' coasts. Although it stated no outer boundary as such, it used the term "continental shelf" which was described in an accompanying press release as generally extending to a point where the water reaches a depth of 600 feet.<sup>9</sup>

Not only was the United States' assertion of jurisdiction and control over its continental shelf accepted by the international community without any objection, but several other states followed suit and issued proclamations asserting claims over their respective continental shelves and reserving exclusive rights to exploitation of the subsoil outside their coasts. By 1958, some twenty states had claimed sovereign rights over their respective continental



shelves. The content of these proclamations and the nature of the rights claimed under them varied considerably. While some of the proclamations invoked the claim to exclusive justification and control, others spoke of sovereignty and of unqualified incorporation into the national territory of submarine areas. While some referred to the continental shelf, others mentioned the sea bed and its subsoil adjacent to their national territory. Some defined the area of the continental shelf by reference to the depth of the sea. Others were silent on the subject or left the extent of the areas in question to be determined by future agreements. While some declarations were limited in claims over the continental shelf or submarine areas, others combined such announcements with a claim to jurisdiction or sovereignty over the superjacent waters and air space.<sup>10</sup>

In 1947 Peru claimed a 200-mile zone as did Chile. In 1952 Chile, Peru and Ecuador joined in the Santiago Declaration affirming the legality of 200-mile zones upon which Ecuador asserted a 200-mile territorial sea. Since the Santiago Declaration these three countries have many times set forth various legal rationales for their claim. One of their arguments is that if the United States had a unilateral right to claim the resources of the sea beds adjacent to its coast to the exclusion of all other countries, they

too had a similar right to make claims consistent with their own national interests.

Claims were so widespread by 1958 that the United Nations Conference on the Law of the Sea was convened in Geneva from February 24 to April 28, 1958. This conference was one of the most important international conferences held, in that it was the first serious attempt ever made by governments of the world to codify international law.<sup>11</sup>

This conference derived its importance from several facts. First, it was attended by all of the major maritime states of the world, including most, but not all of the members of the United Nations plus some important non-member states such as Switzerland. Moreover, the list of participants included several land-locked states, emphasizing their interest in the utilization of the ocean resources of the world.

Second, the Conference was the most important held to date on the law of the sea because of its broad scope and its accomplishments. Four conventions, an optional protocol and nine resolutions, ranging over most major aspects of maritime legislation, were adopted. The four conventions dealt with: territorial seas and zones adjacent to them; the general regime of the high seas; fishing rights and conservation of the living resources of the high seas; and exploration and exploitation of the resources of the



continental shelf. Under the terms of the optional protocol, all countries signing it agreed to recognize the compulsory jurisdiction of the International Court of Justice in disputes arising out of conventions on the law of the sea. The nine resolutions dealt mainly with related maritime matters.<sup>12</sup>

Thirdly, the 1958 Geneva Convention can be considered of major importance in that it represented the first major United Nations Codification Conference, which set the pattern for similar future conclaves under the aegis of the United Nations.

Finally, the 1958 Conference is of particular significance in that the participatory delegates viewed with determination their continuing duty to seek a solution to those problems on which agreement could not be reached in 1958. The Conference approved a resolution requesting the General Assembly to consider convening a second international conference for further study of questions left unsettled.<sup>13</sup>

During the two years between conferences, extensive preparations were made by many nations. The United States, firmly convinced that six miles was the outer limit consistent with security and limitations of neutrality patrol, and fortified by the support for its compromise proposal at the 1958 Conference, had its representatives from the Navy

and the Department of State visit nations all over the world to secure support for the six-mile limit with six additional miles of fishing control. While the United States preferred a retention of a three-mile limit for a marginal sea, analysis of the voting at the 1958 Conference revealed that such a limit had no reasonable chance of approval.<sup>14</sup>

The Second United Nations Conference on the Law of the Sea met in Geneva from March 16 to April 26, 1960. Convened in accordance with General Assembly Resolution of December 1958, the Conference was held to consider further the questions of the breadth of the territorial sea and fisheries limits. The Conference was attended by 500 delegates from 88 countries and eight United Nations related agencies.<sup>15</sup>

By 1960, more than 31 territorial sea claims exceeded three miles, and at least 16 continental shelf claims of one sort or another also exceeded three miles. Already things were beginning to build up a certain momentum of states making claims to extensive offshore areas. It was this momentum that caused the 1958 and 1960 Law of the Sea Conferences to be held in the first place. The main output of these two conferences can be seen as a sort of first-stage victory for the coastal state movement. What the conference did was to legitimize, in a certain form, claims to the continental shelf, thereby allowing the coastal states a first claim at the areas off their shores.

It was agreed that coastal states could claim the continental shelf to a limit of 200 meters depth or the limits of exploitation. This was, in fact, a major victory for the coastal state movement. There was no resolution at the Conference on the question of the width of the territorial sea, but most of the argument was within the area of 6-12 miles, indicating that the territorial sea limits of the old regime were crumbling.<sup>16</sup>

The failure of both the 1958 and the 1960 United Nations Conferences on the Law of the Sea (UNCLOS I and II) was indicative of the more general failure of the International Law Commission and both UNCLOS I and II to consider the significance of the trend toward coastal nations who were not global maritime powers.

UNCLOS III: The decade of the sixties witnessed rapid and radical transformations of world-wide scale. Technological developments spurred by the arms race, space exploration, and economic growth have had lasting effects that have transcended local and national interests. The 1960s saw the final disintegration of colonial empires and the accession of many new states to independence, especially in Africa and Asia. These nations were wary of the existing international legal and economic order established prior to their independence and which systematically suppressed their national aspirations for many years. These new nations



constitute what is referred to as the "Third World" countries. It was this international and economic order that, from their perspective, kept the people of the Third World under colonial rule and subjected their natural resources to centuries of exploitation. It is no wonder that these new states felt no obligation to observe conventions in which they did not share in formulating and which neither recognized nor acknowledged many of their legitimate rights. Consequently, Third World nations have felt little or no constraints in proposing changes in the international legal and economic order that are contrary to existing principles. As active participants in world politics, Third World countries are seeking to redress the imbalance in the international legal and economic order. UNCLOS III has provided them with a most appropriate forum to right, what they see, are the many wrongs of past centuries.

The main instrumentality through which the Third World has advanced its views and positions on the Law of the Sea negotiations has been the Group of 77 which first made itself felt as a force espousing Third World economic interests was 1964. By achieving consensus on important and often controversial issues and by devising appropriate strategies, the Group of 77 has enabled developing nations to play an active role in the formulation of the final version of the Law of the Sea Treaty.<sup>17</sup> "The demands of

Third World states for the establishment of a new international economic order are highly relevant to the negotiations at UNCLOS III and help make understandable, though not necessarily palatable, their views and what they desire to achieve at that conference."<sup>18</sup>

The Law of the Sea Treaty that was opened for signature in December 1982 is the outcome of negotiations that began in 1973. UNCLOS was convened in order to create an all-encompassing framework for regulating the sea. The most important and controversial features of the Treaty concern rights of navigation through and flight over straits and the regime for mining the deep sea bed. Other provisions, of course, include the management and protection of fisheries, conservation of the environment, continental shelf oil and gas production, scientific research and dispute settlement. Freedom of navigation was an issue because, as we have seen, an increasing number of states claimed sovereignty over waters extending twelve or more miles from their shores. The major powers were becoming concerned about this erosion of the traditional three-mile limit because it threatens unimpeded passage through militarily and commercially important straits. The United States and the Soviet Union strongly desired to reestablish a universally accepted regime to forestall challenges to the right of transit over and through critical maritime chokepoints. The other

central issue in the negotiations was the deep sea bed, which western companies wanted to mine. The large investment required to undertake this activity makes necessary a stable regime of guaranteed access and secure tenure.

Prior to the first session of UNCLOS which opened in Caracas in 1973, the United States and the other interested western nations made a concession that was to influence significantly the outcome of the proceedings. They agreed that all issues relating to the law of the sea would be negotiated and resolved at UNCLOS. Addressing so many difficult issues in the same negotiations ensured that the proceedings would be mired in complexity, and that concessions in one area would be traded for benefits in another. Anti-western rhetoric and Third World demands for resource transfer became important elements in the proceedings. Because most participants had few if any tangible interests in the law of the sea, they could advance ideological demands on nations with an important stake in a successful outcome. Because Third World agreement was required for the convention to become effective, western negotiators were strongly influenced to make concessions to states whose only negotiating asset was the right to assent to or to reject the Treaty.<sup>19</sup>

The Law of the Sea III Convention was a long time in session as we have seen. Preparatory negotiations started



in 1967-68 within the framework of the UN Seabed Committee, and the Third United Nations Conference on the Law of the Sea (UNCLOS III) starting in 1973 had, over the past nine years, worked itself through some twelve regular sessions, several intersessional meetings, and several informal negotiating texts. As a result of the experiences of the previous attempts to resolve major ocean issues, it was very strongly felt that it would be an exercise in futility to draw up a draft convention that would be unacceptable to one or more of the main groupings within the UN. If any of the main groupings of nations remain outside of the Convention, then the Conference would be a failure in its' two main functions, viz. to create a political and legal system for the oceans acceptable to all, and to create the necessary conditions for an effective management of the "Common heritage" of the oceans.

The Third United Nations Conference on The Law of the Sea (UNCLOS III) is constantly referred to as the most ambitious treaty-making attempt ever undertaken by the world community.<sup>20</sup> The Draft Convention on The Law of the Sea is extremely complicated. In nine years of negotiations roughly 160 states argued over a new law of the sea and finally agreed on a Convention aiming at universal validity with its 320 articles, nine annexes and five resolutions

covering every use of the ocean and all categories of sea, or 71 percent of the surface area of the world.

The first substantive session of UNCLOS III took place in the summer of 1974. In 1975 frustration had begun to show itself with the slow negotiations. This led the conference to accept the suggestion that the Chairmen of the three main committees submit texts containing draft provisions which appeared to command significant support. The President of the Conference and the three main Committee Chairmen have played an unprecedented role in the Conference. In taking upon themselves the task of preparing the informal negotiating texts, they have in effect presented comprehensive consecutive draft texts of the Convention. These texts have served as visible signs of the progress of the negotiations and at the same time as the bases of discussions in the Conference. This approach was highly successful.

The substantive work of the Conference took place in the three main committees and subcommittees and negotiating groups. The First Committee was charged with drafting articles pertaining to the international area and the international organization--the Seabed Authority.

The Second Committee was entrusted with the somewhat conventional issues of the oceans, i.e., territorial sea, high seas, straits, management of the living resources of



the oceans, in addition, the new concepts of the 200-mile economic zone and of the land-locked and geographically disadvantaged countries.

The Third Committee was charged specifically with three well defined tasks, namely, to draft articles on the protection and preservation of the marine environment; marine scientific research and the development and transfer of technology.<sup>21</sup>

UNCLOS III had to face, early on, the problem of adoption of procedural rules that would affect the diplomacy of the conference to a great degree. A straightforward voting procedure was not acceptable because of the superior numerical strengths of developing countries compared to that of the developed states as mentioned earlier in this discussion. Since it was the developed states that wanted and had the capability of harvesting the resources of the oceans, it was to the advantage of the developing countries to attempt to accommodate these interests in the hope of gaining some return for themselves. The complexity and interrelationship of the issues, and the importance put on ocean resources by the States, make a straight voting procedure inappropriate. The first session of UNCLOS III ended without a determination of the appropriate procedural rules, however, the second session in 1974 produced an agreement.

The rules adopted did not allow for voting, but were very clear that voting should be a last resort and that the Conference should proceed by consensus.

As a general approach to reaching agreement in the United Nations system consensus has been increasingly used to, "avoid a clash or a clearly black and white vote in the international community where large majorities are pre-existing. It is used, also, to safeguard the rights of all participants."<sup>22</sup>

Consensus does not mean unanimity, since that implies positive support. Rather, it means a convergence of opinion and the absence of strong disagreement from States and the willingness for a matter to pass without formal objection. "The consensus principle is the cornerstone of the decision-making process."<sup>23</sup>

Closely related to the consensus approach is the concept of a package deal. The package deal entails that all the main parts of the Convention must be looked upon as an entity, as a single negotiated package, where the laws of give and take have presumably struck a reasonable balance between the participating states. This concept of the package deal has obvious merits for a convention of this magnitude and complexity. It also seems a precondition for adopting the Convention by consensus. "Consequently, national administrations, still insisting on the necessity

of preserving national and nationalistic viewpoints, are more and more compelled to face international decisions on interests which often conflict."<sup>24</sup>

From December 1973 to the opening of the Treaty for signature in December 1982 the UNCLOS III had twelve formal meetings and produced the treaty with 17 parts and some 320 articles and 9 technical annexes. It was during the eleventh session on April 30, 1982, in New York, where it was determined that all efforts at reaching general agreement were exhausted, that the Conference voted, at the request of the United States, on the issue of adopting the Convention on the Law of the Sea. Everyone knew that the hope that had guided the extensive work over the past nine years and the hope for consensus on this work was not to be realized. The request for the recorded vote was delivered to the Conference President in writing. The vote was 130 countries in favor, 4 voted against--including the U.S.--and 17 countries abstained and 4 did not participate in the vote. So far as the delegates and observers were concerned they acknowledged the magnitude of the achievement. After 93 weeks of meetings and thousands of hours of private consultations, a broad agreement had been reached on all matters relating to the law of the sea.

Parts of the Convention are consistent with the United States' interests and would contribute to the advancement



of our national goals. Other provisions are contrary to the United States' interests, as outlined by the present Administration after its review of UNCLOS III in 1981-82. To attempt to capitalize on the positive aspects of the Treaty, while at the same time defending against the adverse impacts, will be a very difficult task. It is certain that the U.S. will find it necessary to adjust its existing ocean policy during the coming years.

The United States will not be able to isolate itself from the impacts of the possible significant changes in maritime law that are sure to transpire in the years to come. As was mentioned earlier in this discussion it is likely that the Treaty will come into force sometime within this decade and the actions of individual states leading to this event will require the U.S. to have a broad range of responses.

The question arises at this point as to what has the United States been doing during all of the negotiations? If the Treaty is so unacceptable from the U.S. perspective, how does it happen that we have arrived at such an impasse? After all, the U.S. had been a principal initiator in causing UNCLOS III to happen.

### CHAPTER III

#### The Crucial U.S. Role: Significant U.S. Initiatives

The answer to the question raised at the close of the preceding chapter as to what the U.S. has been doing is that the U.S. has been very busy creating the very Treaty that we now repudiate. We must look at the U.S. record starting with the 1945 Truman Proclamations which were discussed briefly in the preceding chapter. These proclamations instigated or at least accelerated the coastal nation expansion. The United States, with more interest than any other nation in preserving norms of free enterprise and free navigation, upset the apple cart when President Truman made the two famous declarations. As we have seen, the first claimed exclusive jurisdiction over the resources of the Continental Shelf, with the important qualification that this did not affect the status of the superjacent waters as high seas. The second, issued simultaneously, qualified the qualification by asserting its jurisdiction and control over fishing only by our nationals, and jointly with others whose nationals had historical fishing claims.

As we have seen many states followed the U.S. position and claimed their various areas under their national control. By the late 1960s this trend so concerned the U.S. in its role as a global ocean power that we entered into

discussions with the Soviet Union as to what action could be taken to impede this impending threat to freedom of navigation, especially through straits as they are affected by the trend for a twelve mile territorial sea. The two countries agreed that a new law of the sea conference should be convened and both nations began to promote the idea.

The United States, as the leading maritime power and as the most advanced country in ocean technology, could not ignore the fast changing law of the sea and the inevitable course of events. Announcing a new ocean policy for the United States on May 23, 1970, President Nixon emphasized that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. He said that if not modernized multilaterally, unilateral action and international conflict were inevitable. He proposed that all nations adopt a treaty in which they would renounce all claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters. Everyone was to agree that these resources would be regarded as the common heritage of mankind.<sup>1</sup>

Beyond the limit suggested, the Treaty should also establish an international regime for the exploitation of the resources of the seabed. This regime is supposed to provide for the collection of mineral royalties that would



be used for international community purposes, in particular for economic assistance to developing countries. The regime is to lay down rules to prevent unreasonable interference with the other uses of the sea. The protection against ocean pollution, assurance of the integrity of investments and provisions for a peaceful and mandatory settlement of disputes were also spelled out in this announcement.

Beyond the 200-meter isobath, it was proposed that two types of machinery for exploitation be used. The first was that coastal nations act as trustees for the international community in the trustee zone which would be comprised of the continental margins beyond 200 meters off the coasts. Each coastal state would, in return, receive a share of the international revenues from the zone in which it acts as trustee and could, if desired, impose additional taxes.

The second type of machinery proposed concerned the area beyond the continental margins and would authorize and regulate exploration and use of seabed resources beyond the Continental margins.

Since the negotiations for these proposals were so complex and would take considerable time to form a treaty, it was suggested that, for the interim period, a grandfather clause be in effect where leases and permits for depths greater than 200 meters would be issued, subject to the international regime to be agreed upon, and that the regime

should include necessary protection for the integrity of the investments made in the interim period.

The proposal also suggested that the conclusion of a new treaty should provide for the establishment of a 12-mile limit for territorial waters and for free transit throughout international straits.<sup>2</sup>

On August 3, 1970, the United States submitted a draft of President Nixon's proposals entitled, "United Nations Convention on the International Seabed Area," as a working paper for discussion purposes, to the United Nations Seabed Committee.<sup>3</sup> This draft was prepared after a great deal of thought and thorough study and laid down in great detail the President's proposals and included many recommendations. It designated all areas of the seabed and the subsoil of the high seas seaward of the 200-meter isobath adjacent to the coast of continents and islands as the International Seabed Area which was to be considered the common heritage of mankind and reserved exclusively for peaceful purposes. It also specified that no state could claim or exercise sovereignty or rights over any part of the Seabed Area or its resources. It also proposed that each state that is a contracting party would not recognize any claim of sovereignty by another state. A final major point of this draft was that no state may acquire any right, title, or interest in the International Seabed Area or its resources except as



provided in the draft. This Nixon proposal was a most generous concession to the Third World.

Most states--especially the newly independent, developing countries--were in the process of studying their interests and had not made up their minds as to where their interests lie. They, therefore, did not wish to be hurried into accepting any limitations on their sovereign rights. In any event, they wanted to keep their options open. And as events passed the Nixon proposals were not accepted. Partly because so little was known so far as the geography and geology of most of the continental margins, partly because most of the countries were unaware of the extent of mineral resources of the sea or partly because nations had not been able to assess all of their interests, most countries responded with caution and hesitance to the U.S. proposals for any scheme that would delimit the legal continental shelf.<sup>4</sup>

In 1976 UNCLOS III was well underway. Through tremendous efforts on the part of the United States' navigation rights, including straits passage, were already part of the treaty package. The Conference, however, was bogged down on the deep seabed regime. Basically, the nations representing private miners were stressing a simple licensing scheme and an otherwise unrestricted access to seabed minerals by private miners. The Group of 77 preferred a

new International Seabed Authority that would itself exclusively mine the deep seabed. The producers of minerals from land-based sources wanted production restrictions placed in the treaty to protect them from competition from seabed minerals mining enterprises.

The Third World wanted the seabed regime to be a New International Economic Order (NIEO) model, and the industrialized nations wanted it to be proof of the viability of the traditional international system. Therefore, the seabed issue was also a struggle over the precedent-setting effect that the seabed regime would have for future North-South negotiations on other issues. "What is favored, then, by developed states is an extension of opportunities for commercial activity in the seabeds of the deep ocean areas under essentially traditional circumstances. . . . The developing states, however, perceive UNCLOS III as a major opportunity to realize ideals of an NIEO, . . . to the developing states the precedential value of decisions taken on deep seabed mining may weigh more heavily than the practical consequences of their decision on seabed mining."<sup>5</sup>

The question of who should have the right to exploit the deep seabed resources had to be settled before the question of conditions of mining could be dealt with.

The confrontation of the two opposing regime philosophies had led to a stalemate in the seabed negotiations in

the Seabed Committee, and the stalemate continued. The United States and other industrialized nations presented various drafts which contained variations of a license system. The Group of 77 presented a single common draft which gave the International Seabed Authority exclusive jurisdiction over the deep seabed. This proposal was completely unacceptable to the industrialized countries since it did not guarantee the access to the seabed they demanded.

A compromise was in order and the obvious was a mixed or a parallel system in which both national companies and the Enterprise would be allowed to operate independently. As mentioned earlier, such a system had been suggested but received little notice. It began to attract attention when, at Geneva in 1975, the United States and the Soviet Union began to give the idea support. At this session the United States presented what was called a banking system, a two area system in which national companies would apply to the Authority for two seabed mine sites of equal commercial value. The International Seabed Authority would issue a license to the national company for one site and reserve the other for itself to exploit, alone or in joint venture with national companies, possibly from the Third World.

At the negotiating sessions at Geneva in 1975, the working group chairman was Mr. Pinto of Sri Lanka. Pinto presented a paper which borrowed from the Group of 77, the



Soviet Union and the United States' drafts and combined them into a single plan. The main idea of this plan was based on a joint venture between the International Seabed Authority and national companies, but it included the two-area system and provisions for the transfer of technology to developing countries. This Pinto plan represented a first attempt at moving toward a compromise based on some sort of parallel system. The Pinto plan did not meet with success.

The industrialized countries and a small number of Third World countries were willing to negotiate on the basis of this Pinto text but the majority of the Group of 77 rejected any consideration of the parallel system. According to the Third World, the parallel system contradicted the essence of the concept of common heritage. Their thinking was that the common heritage belonged to mankind collectively and was not divisible and must be regulated and controlled under one regime.<sup>6</sup>

A number of Third World countries supported the Pinto initiative to reach a compromise. These countries were primarily those land-based producers of minerals. They would rather have no seabed mining at all, but should UNCLOS III fail, then the subsequent unrestricted unilateral seabed mining would be disastrous to their economic welfare.

No compromise was reached at the third session at Geneva in 1975, and an Informal Single Negotiating Text (ISNT) was issued, at the close of that session, which was very much the Group of 77's position from the start of the negotiations and was unacceptable to the industrialized nations.

During the intersessional period between 1975 and 1976 and at the fourth session in New York in 1976, the Secretary of State, Henry Kissinger became personally involved in an attempt to get the Convention moving and pushing for a resolution on the seabed mining issue. Kissinger outlined the U.S. position on the law of the sea negotiations before the American Bar Association in August 1975. He reiterated the United States support for a parallel system and then said that if essential U.S. interests were guaranteed, the United States would be prepared to explore ways of sharing deep seabed technology with other nations.<sup>7</sup> Though vaguely worded, this concession was the first indication that the U.S. was willing, as a compromise, to help make the Enterprise operational if the parallel system was accepted.

Secretary Kissinger appeared in New York on several occasions during and in between the fourth and fifth sessions of the Conference. In a speech before the Foreign Policy Association, the U.S. Council of the International Chamber of Commerce and the U.N. Association of the U.S.A. he recalled everyone's attention to his speech in Montreal

the previous summer in which the U.S. comprehensive program was offered in the hope of concluding the UNCLOS III negotiations in 1976. He then went on to offer new proposals addressing the remaining important issues so that the negotiations could lead to a final result that year. He repeated the parallel system for mining proposal; the U.S. willingness to share technology

. . . Finally, the United States is prepared to make a major effort to enhance the skills and access of developing countries to advanced deep seabed mining technology in order to assist their capabilities in this field.

He added a new concession not put forward by the U.S. before

. . . in response to the legitimate concerns of land-based producers of minerals found in the deep seabeds, we offer the following major contribution to the negotiations: The United States is prepared to accept a temporary limitation, for a period fixed in the treaty, on production of the seabed minerals tied to the projected growth in the world nickel market, . . . After this period, the seabed production should be governed by overall market conditions.

What Secretary Kissinger said was that the U.S. was willing to accept a preventative approach to solving the problems of land-based producers. Although the arrangement was to be fixed in time, it was, in fact, a major concession. The Montreal and the New York speeches included clear statements of unilateral action on the U.S. part if agreement was not reached soon.

The United States believes that the world community has before it a grave responsibility. Our country cannot delay in its efforts to develop



an assured supply of critical resources through our deep seabed mining projects. We strongly prefer an international agreement . . . . But if agreement is not reached this year, it will be increasingly difficult to resist pressure to proceed unilaterally.<sup>10</sup>

The combination of inducement-threat strategy seemed to work for a brief period until the fifth session in August-September 1976. The Group of 77 gathered the majority behind them in a total rejection of the parallel system, which brought the negotiations back to where they were after the 1974 Caracas session, in a deadlocked position.

Secretary Kissinger again appears in New York on September 1, and in a speech made at a reception for heads of delegations to the Conference on the Law of the Sea, he brought up the problem of how to enable the Enterprise to become operational. He reviewed the last session where the U.S. parallel system was proposed and reflected in the negotiating text. He pointed out that many countries have expressed reservations on the grounds that the international community did not possess the financial resources with which to mine or even to put the Enterprise in business, and if the transfer of technology to the international community were not provided for, then they could not support the parallel system.<sup>11</sup>

We have taken these views into serious consideration. . . . on the occasion of my meeting with some of the members of Committee I, I proposed on behalf of the U.S. Government that the United States would be prepared to agree to a

means of financing the Enterprise in such a manner that the Enterprise could begin its mining operation either concurrently with . . . state or private enterprises or within an agreed time span that was practically concurrent.<sup>12</sup>

The proposal also included agreed provisions for the transfer of technology and a proposal for periodic review at intervals to be negotiated, but suggested to be 25 years, because some viewed that it might be premature to establish a permanent regime for the deep seabeds.

What this all means is that the United States has been very active and has made serious efforts to move the Conference forward. Secretary Kissinger again warned the delegates, "But there are limits beyond which no American leader can go. And if those limits are attempted to be exceeded, then we will find ourselves in the regrettable and tragic situation where at sea--just as previously on land--unilateralism will reign supreme . . . We in the United States would not, in the short term, have any disadvantage from this--quite on the contrary."<sup>13</sup>

In 1976 both the United States and the Soviet Union introduced a 200-mile fisheries zone. The United States fisherman had become impatient with the progress of UNCLOS III and were pressuring the Congress for action against both the Soviet Union and Japan whose fishing boats and factory ships were within sight of the coasts of the U.S. The State Department was, of course, against any action



that would adversely impact on the UNCLOS III negotiations and the Department of Defense was, as we have seen, against any legislation that would seem to approve of creeping jurisdiction. However, President Ford signed the Fishing Conservation and Management Act of 1976 into law.

The act which established an exclusive 200 mile zone for U.S. fishery management declared that

. . . The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of the United States fishermen<sup>14</sup>  
. . .

Under the provisions stating the purpose of the act Congress declared,

. . . to take immediate action to conserve and manage the fishery resources found off the coasts of the United States . . . by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over anadromous species and continental shelf fishery resources<sup>15</sup> . . .

Congress further declared its policy to be

. . . to maintain without change the existing territorial or other ocean jurisdiction of the United States . . . to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.<sup>16</sup>

The State Department concern was understandable from a negotiation point of view. By unilaterally introducing

what a majority of states were seeking in the UNCLOS process, the United States contributed to legitimizing what had already been proposed as part of the package concept without getting the quid pro quo: treaty guaranteed navigation rights. The United States, in effect, lost some bargaining power.

The option for unilateral action exists in other areas, such as deep seabed mining. To take unilateral action in this area, however, requires that the technology and capital investment be available to the state claiming this action. The threat to take unilateral action in the area of deep seabed mining had been espoused by the United States in the years since UNCLOS III began its slow progress generally, and specifically during the period characterized by lack of progress in the area of deep seabed mining. This threat was given real substance in the summer of 1980, when Congress passed and President Carter signed the Deep Seabed Hard Mineral Resources Act, Public Law 96-283. This act makes it possible for the United States mining industry to plan the start of commercial mining of deep seabed minerals after January 1, 1988. Included in the findings and purposes of the Act, Congress finds that

. . . it is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other

freedoms recognized by general principles of international law . . . legislation is required to establish an interim legal regime under which technology can be developed and the exploration and recovery of the hard mineral resources of the deep seabed can take place until such time as a Law of the Sea Treaty enters into force with respect to the United States.

William C. Brewer, Jr. claims that this U.S. action caused a storm of protest within the negotiations with allegations of bad faith on the part of the U.S. negotiations. "It is not yet clear, however, whether the United States legislation actually slowed the progress of negotiation by making further concessions less palatable to the G-77, or whether the display of United States resolve had in fact expedited it."<sup>18</sup>

Whatever the case, the record shows that the ninth session at New York and Geneva in 1980 and the tenth session in New York in 1981 produced the first official text of the draft convention which was issued during this session. Jamaica and the Federal Republic of Germany were chosen as seats for the International Seabed Authority and the International Tribunal for the Law of the Sea respectively. The United States is still not satisfied with the seabed provisions.

The United States announced on March 2, 1981 that there were some serious concerns raised within the United States, specifically with respect to deep seabed mining provisions

of the draft convention, and that the new Reagan Administration would review the proposed draft convention before negotiations were ended.



## CHAPTER IV

### The U.S. Interests and the Law of the Sea III Treaty

At the end of the ninth session of the Law of the Sea Conference in 1980, there was general agreement that progress was moving ahead such that 1981 would see the adoption of the Convention. However, on the eve of the March 1981 tenth session, the U.S. delegation was instructed to ensure that the negotiations did not end at that session. "Delegates to the tenth session were therefore stunned by the announcement of the United States government made only days before the session opened that the United States would not agree to the adoption of a convention at the session and that a back-to-the-beginning review would have to be conducted . . ."<sup>1</sup>

This announcement should not have been such a surprise to anyone when you consider the fact that the U.S. had repeatedly stated that it was not satisfied with the provisions relating to the deep seabed aspects of the convention. "The concern of the Senate about the Law of the Sea is not recent. The Senate has in the past and will, I trust, in the future consider this matter in a totally bipartisan spirit."<sup>2</sup>

This discussion will limit itself to those aspects of the Treaty dealing with the freedom of navigation and

overflight for both military and commercial vessels and aircraft and with some of the provisions of the draft convention on deep seabed mining.

After the U.S. announcement that the Administration wished to review the Convention, James L. Malone, Chairman of the U.S. delegation to the Law of the Sea Conference made a statement before the Committee on Foreign Affairs, House of Representatives on April 29, 1981 in which he outlined the Administrations' policies toward the review.<sup>3</sup> He stated that some of the features of the draft convention raise certain questions as they relate to consistency with U.S. interests. These areas of concern include

- The establishment of a supernational mining company--the Enterprise--which would benefit from significant discriminatory advantages relative to the companies of industrialized countries. The Enterprise could eventually monopolize production.
- The convention requires the U.S. and others to fund the initial capitalization of this organization in proportion to their contributions to the U.N.
- Compels the sale of technology to the Enterprise and to developing countries. The Enterprise, through the mandatory transfer provisions, is guaranteed access on request to the seabed mining technology owned by private companies and also technology used by them but owned by others. The text also guarantees similar access to privately owned technology by any developing country planning to enter seabed mining.
- Limits the annual production of nodules as well as the amount which any one company can mine

for the first twenty years. This is an attempt to insulate land-based producers from competition.

- The International Seabed Authority is granted wide discretion to select among competing applications to mine which could be used to deny contracts to qualified U.S. companies.
- Creates a one nation, one vote international organization governed by an assembly and a 36 member executive council. In the council the Soviet Union and its allies have three guaranteed seats, the U.S. must compete with its allies for any representation.
- Provides that, after 15 years of production, the provisions of the treaty will be reviewed to determine whether it has fulfilled overriding policy considerations, such as protection of land-based producers, promotion of Enterprise operations and equitable distribution of mining rights.
- If two-thirds of the states' parties to the treaty wish to amend provisions concerning the system of exploration, they may do so after 5 years of negotiation and after ratification by two-thirds of the states' parties. This means that the U.S. would be bound by the changes even if we disagree with them unless we were to denounce the entire treaty.
- No provision is made for protecting investments made prior to entry of the treaty into force.

Mr. Malone stressed that, during the review, an evaluation of all of our national interests and objectives will be accomplished, including national security, to determine the extent to which they are protected by the Convention, and to identify any necessary modifications required to the draft. He also stated that the review would examine whether



these interests and objectives could fare for better or worse without the Treaty.

We think that the world community, too, will be better served if we return to the Conference with a realistic assessment of what will satisfy our people and our Congress. The Administration does not wish to be in a position of misleading other countries into concluding a treaty they will expect us to ratify, a treaty which in many respects is believed by them to satisfy our national interests, and then find the United States is unable to participate in the final result.<sup>4</sup>

The review covered a period of ten months, ending on January 29, 1982, when President Reagan announced that the United States would return to the Law of the Sea negotiations.<sup>5</sup> The President emphasized the importance of the oceans as a source of helping supply the world's food and energy demands and for their resource potential and then outlined the changes that the United States wanted in the deep seabed mining provisions. The specific changes outlined by the President are summarized below. In order to satisfy the United States the Treaty should

- not deter development of any deep seabed mineral resources;
- assure national access to resources to enhance U.S. security and promote the economic development of these resources;
- provide a fair decision-making role in the regime that reflects and protects political, economic and financial interests of states;
- not allow amendments to come into force without approval of participating states, including in our case advice and consent of the Senate;



- not set undesirable precedents for international organizations;
- and be likely to receive the consent of the Senate. The mandatory transfer of private technology and participation by and funding for national liberation movements should not be in the treaty provisions.

Deep seabed nodules are a vast potential source of nickel, copper, cobalt, and manganese. As discussed in a 1982 Comptroller General report, the United States is heavily dependent to varying degrees on foreign sources of these minerals. In recent years we have imported about 98 percent of our cobalt, 97 percent of our manganese and about 73 percent of our nickel. In 1980 these commodities totalled over one billion dollars. These three minerals have been classified as critical under the Strategic and Critical Materials Stockpiling Act.<sup>6</sup>

The American mining industry has invested large sums of money to develop seabed mining technology over the past decade in search for exploitable ore deposits on the deep seabeds of the oceans. However, full-scale development depends upon an assurance of access to these resources and also, a stable, secure investment climate is mandatory. Access would serve our national strategic minerals policy by providing security from foreign mineral imports. There are, however, aspects of the Treaty which threaten the security of access to these minerals and which make the

investment climate for potential mining companies unattractive. Private companies seeking to raise capital necessary to develop and employ seabed mining technology must be assured that, once having made the investment, they will be able to mine without unreasonable interference by international bureaucracy.

As proposed in the Treaty, deep seabed mining would be governed by an International Seabed Authority (ISA), consisting of an Assembly, a Council, a Secretariat and an Enterprise. The Assembly is the supreme organ which provides general policy direction, elects the Council, the Secretary General to run the Secretariat, and the Governing Board and Director General of the Enterprise. All signatory states to the Treaty are members of the ISA and the Assembly. The Council consists of 36 members of the Authority, elected by the Assembly. Each member of the Assembly has one vote. The composition of the Council will include four members having the largest investments in deep seabed mining, including one Eastern Socialist European nation; four from among the major consuming or importing states, including one Eastern Socialist European nation; four from among the major exporting states of those minerals to be mined from the seabed, including at least two developing states whose exports of these minerals have a substantial bearing on their economy; six members from developing nations

representing special interests; and eighteen to assure equitable geographical distribution with at least one from Eastern Socialist Europe.

As can be seen the Eastern Socialist European states have a guarantee of at least three seats on the Council. When you also consider the Group of 77 seats plus other nations not necessarily friendly to the United States the possibility of a voting imbalance could ultimately affect access of U.S. mining companies to the seabed minerals since there is no assurance that the United States will be represented on the Council. This is particularly important when it is realized that the Enterprise, at the direction and control of the Council, will directly carry out the mining, transporting, processing, and marketing of the seabed minerals.

Exploration activities provided in the Treaty will be carried out under a plan of work which must be approved by the Council. Each mine site application will be large enough to provide two separate and equal mining operations, one of which will be reserved solely for mining by the Authority. The work plans will be evaluated based on the rules and regulations and acceptance, by the applicant, of control by the Authority and its policies with respect to activities in the area. The Council's Legal and Technical Commission reviews the work plan and makes recommendations



on all applications. The Treaty states that approval is virtually automatic, the very outcome of the Commission's decision making procedure remains a serious threat to assured access to mining sites. The actual criteria for the Commission to employ in reaching their decisions on access applications has not been defined.

It is not clear that United States mining companies with the capacity and qualifications to develop deep seabed minerals would be granted mine sites. There is no solution provided for in the Treaty for a qualified applicant whose proposal simply is not acted upon by the Legal and Technical Commission.

Even if the United States were to be provided with a permanent or guaranteed seat on the Council, we would not have influence which would be equal to our economic and political interests and our financial contributions. We might be able to protect ourselves against some adverse decisions, we would not have any sufficient voting strength to influence important decisions.

And so it is evident that policy making would be carried out by an organization based on the principle of sovereign equality, one nation, one vote. The policies of the Authority would be decided by a plenary Assembly operating on a two-thirds majority. As a consequence, a majority of nations with political, philosophical, and economic goals



different from those of the United States, could abuse the vague, discretionary provisions of the Treaty. They could make decisions that could hinder United States access to seabed minerals.

When one considers the Treaty provisions which limit the annual seabed mineral production for a period of twenty years, it is again apparent that this limitation will reduce access and hinder development of the minerals. Restrictions would be placed on the amount which any single project could produce. The Authority has broad discretion to select among competing applications when the limit on seabed production has been reached. This discretion could be used to deny an American company access to the seabed. Given the composition and voting scheme of the entire organization the overall policy orientation of the Authority could encourage restrictions on seabed mineral production with limitations on access to American mining companies.

Considering the review Conference provided for in the Treaty, it essentially could impose treaty amendments on the United States over our objection. The Treaty calls for a conference to be convened after the first fifteen years of the Treaty regime, to determine whether the Treaty's policies have been fulfilled. The wording of the provision indicates that the Conference could stress the extent to which the Treaty provisions for seabed mineral mining

provided protection for land-based producers of the same minerals and promoted mining by the Enterprise and the developing countries. If two-thirds of the states that are parties to the Treaty decided to change the system of mining, they could do so after five years of negotiation and after ratification by two-thirds. This would happen without any Senate action.

It is also not very realistic to believe that the parallel system would survive this review when the Enterprise and the developing states would have the choice to establish a monopoly for the Enterprise which would be totally unacceptable to the United States. This review would allow changes in the basic rules early in the production stage of recovery and the conditions essential for economically viable mining would be altered and unacceptable.

The last of the Presidential concerns was the controversial provisions of the Treaty that assured access to technology that could guarantee the Enterprise and the developing countries the capability to mine the deep seabed. It is the mandatory nature of the transfer provision requiring the sale of technology to developing countries that causes great opposition from the United States. It was Kissinger's proposal in 1976 that indicated that there would be some type of necessary technology transfer to the

Enterprise and developing states mining efforts. However, the Treaty technology transfer provisions require that technology used in mining the deep seabed under the Authority, which is legally transferable and available on reasonable terms and conditions, be made available by the operators to the Enterprise and to developing countries when requested. The mandatory provisions of the transfer will only be invoked if the Enterprise is unable to acquire the technology on the open market at reasonable terms.

The companies who have developed this technology at great risk and expense claim that this transfer will compromise their proprietary information. They also feel that their bargaining position for sale of new technology of some long-term value will be weakened by their obligation to sell. They see that their huge capital investments into ocean mining technology will not be reflected under the so called fair and reasonable commercial terms and conditions provided for in the text of the Treaty.

James Malone, Special Representative of the President of the U.S. made a statement before an informal meeting convened by the President of the Conference and Chairman of the First Committee on August 3, 1981. The copy in my possession cautions that the statement is provided for the use of Law of the Sea Conference participants only and is not intended for public dissemination. I feel that since



the events have unfolded, and the content of this statement is common knowledge today, there is no moral obligation to honor the caution against public dissemination. I will therefore quote from Mr. Malone's statement.

In the attempt for the United States to put forward the issues resulting from the review of the Draft Convention, Malone placed before the Committee a series of criteria used to evaluate Part XI of the draft treaty. They were the same items that were mentioned in his statement before the Committee on Foreign Affairs on April and cited earlier in this chapter. The one major significant item in this statement was, after he outlined the problems that the U.S. has with the powers of the Assembly and the Council, he states

. . . If we can establish a regime for seabed minerals which meets the concerns we have outlined in connection with the powers of the Assembly and the Council and the production policies of the Authority, our view of<sup>7</sup> this Convention could be dramatically altered.

Thus, the United States had laid down its objections to Part XI of the Convention before those who could influence the future course of United States participation.

T.G. Kronmiller, the Deputy Assistant Secretary of State for Oceans and International Environmental and Science Affairs, delivered a statement before the Marine Technology Society on September 8, 1981, in which he outlines the happenings leading up to Mr. Malone's statement. He recalls



that on August the 5th, 1981, the President, Mr. Koh, convened an informal meeting of the plenary at the request of the Chairman of the Group of 77. The United States was requested to deliver a comprehensive statement of its' position. Rather, Mr. Malone concentrated on questions raised during the review period as they were issues of importance to the U.S. and involved Part XI of the informal draft.<sup>8</sup>

On August the 10th, the Chairman of the Group of 77 presented a statement to this same informal group at which he outlined the disbelief, consternation and general confusion that the U.S. review caused the entire Convention. He did mention the Group of 77 and the Conference as a whole agreed to provide the U.S. with the time to complete the review. With Malone's statement earlier, really not what everyone had in mind, the Group of 77 launched a verbal attack with all of the harsh innuendoes characteristic of these exchanges over the years. He mentions the right of the U.S. to its' opinions and the rest of the world to their individual rights, and addresses the Common Heritage of Mankind. He then said

. . . The United States perhaps believes that it would be in a position to mine the seabed area without an international treaty through its national legislation. The views of the Group of 77 to the effect that such unilateral legislation is contrary to international law are clear and on the record and I do not have to repeat them. The Area and its resources which are the Common

Heritage of Mankind cannot be allowed to be exploited by a few, for the benefit of a few, to the exclusion of the rest of the world. . . . Great powers cannot afford anymore the luxury of pursuing national interests which adversely affect the developing countries and still hope to be accepted as world leaders. Policies geared only to the achievement of national goals and objectives would be counter-productive and could lead to an ultimate breakdown in international relations. . . .

The statement continues in the vein of the quotation, stressing how it was agreed in 1978 that any revisions of the text should be a result of the negotiations themselves and not as a result of any single person or delegation introducing them, unless they had been presented to the Plenary who would give widespread support if it was felt to offer a substantially improved prospect of consensus. The Group of 77 said that it was committed to this agreement since the members felt that if all delegations were to attempt to renegotiate the issues that they had doubts about, then the negotiations would never end. "The present text may not be satisfactory in all its aspects to all delegations but it can be stated fairly confidently that it commands the best prospects of consensus. . . . The Group of 77 is also of the view that there should not be any reopening of issues already negotiated."<sup>10</sup>

On August the 13th, Ambassador Malone delivered a statement in which he outlined the specific areas to which

the United States' objectives are not met, the items developed at the start of this chapter.

On August the 17th the Chairman of the Group of 77 again addressed the informal group to answer Ambassador Malone's comments of the 13th. The most significant part of this statement is in the opening of the first substantive paragraph, Mr. Hague states . . . "I should also underline that my statement today should not be construed as the beginning of a dialogue on the basis of the objectives set forth by Ambassador Malone, since in our view these objectives are neither widely shared nor compatible with the overriding concerns of the international community."<sup>11</sup>

And so the lines were drawn and the views of the parties known. Whether or not the final negotiating session, which ended in New York and the vote already discussed, achieved the objectives of the United States depends upon one's perspective. When you see that the text that finally evolved moved towards the United States' demands in a number of ways, you see some progress. The final draft amended the provisions for voting in the Council to provide that the largest consumer would be guaranteed a seat on the Council; it improved the procedure to be followed in the consideration of amendments after twenty years by providing that every effort should be made to achieve consensus, and by increasing the majority required to approve such amendments from two



thirds to three fourths. Very probably the most significant change was that the Conference approved a special resolution that gave the four first-generation mining consortia special status as pioneer investors, thereby virtually assuring them of a secure mine site when the superceding Treaty itself entered into force, or even if it did not. The issue of national liberation front movements was sidestepped by permitting them to continue in the same observer status to which they had been entitled during the negotiations themselves.<sup>12</sup>

From another perspective we find that the texts did not make the extensive fundamental changes in the system that the U.S. delegation considered to be required. Financial arrangements, the production ceiling and the governance provisions were carried forward virtually unchanged. More flexible instructions might have made it possible for the U.S. to achieve two small but important changes that had been suggested by a rather neutral group of Western countries that were friendly to the U.S. The proposals were that of eliminating the mandatory aspect of technology transfer; and changing the amendment procedure so that an amendment, even when ratified by the necessary majority of other states, would not be binding on a state that had not or would not ratify it.

During most of the session it seemed inevitable that these proposals, or variants thereof,



would be included in the final text of the Convention. However, the inflexibility of both sides and the procedure adopted made this impossible. The G-77 adopted a negative attitude that failed to appreciate the importance of the proposals of the 11 'good samaritans' for overcoming at least those of the U.S. objections that were most widely shared by the other industrialized states. The USA did not reject the proposals of the G-11 alliance, but raised a series of difficulties that were interpreted by many as a form of rejection.<sup>13</sup>

The proposals offered to the United States' concerns over Part II were insufficient and, as mentioned in the opening Chapter of this discussion, the vote was demanded and the results tallied which revealed the U.S. rejection of the Treaty.

Before we can discuss the implications of the U.S. living outside the Treaty, we must consider the aspect of the freedom of navigation and overflight for both military and commercial vessels and aircraft.

In Chapter II of this discussion the history of the development of the concept of "Freedom of the Sea" was evolved and traced up to 1945, then beyond, to the creation of the Law of the Sea Conference which essentially will end with the Treaty's ratification, whenever. We have demonstrated the concern of some major maritime powers on the encroachment of the freedom of the seas as concerns the 12-mile territorial sea and transit of certain straits. We detailed the procedures involved in the Conference sessions where the United States, after concerted effort, managed to

get the navigation rights, including straits passage in the Treaty package by 1976 when Henry Kissinger was still attempting to get the Conference moving on the deep seabed issues.

Suffice it to say, at this point, that the United States concerns of freedom of the seas and specifically transit passage issues, were part of the Treaty. The President of the United States has already been quoted in this discussion as stating that the transit passage provisions are most acceptable to the United States.

The question remains, now that we know that and why the United States has rejected the Treaty, as to what will be the problems of our existing outside of the UNCLOS III Law of the Sea Treaty.

## CHAPTER V

### U.S. Nonparticipation and Current Reality

Whether or not others join the United States in rejecting the Treaty, certain lines have been drawn up between a few countries and the rest of the world. The United States position is that its nationals have the right to mine the deep seabed nodules in areas beyond the national jurisdiction as a traditional right of the freedom of the high seas, (supra, p. 36). The vast majority of other nations do not recognize such a right. The U.S. position argues that the balance of the Treaty, in which the U.S. was involved with the negotiations and to which we have no objections, will become customary international law because they will be so widely accepted. As customary law the U.S. would be able to take advantage of them even though we refused to sign the Treaty itself.

The late Professor Oppenheim, in his Treatise on International Law, last published in 1957, identifies two sources of International Law. "The sources of International Law are therefore twofold, namely: (1) express consent, which is given when states conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) tacit consent, that is, implied consent or consent by

conduct, which is given through states having adopted the custom or submitting to certain rules of international conduct."<sup>1</sup>

McDougal and Reisman, in their discussion of the juridical nature of customary norms of international law, state

. . . Customary norms of international law are being formed in international practice, as a rule, gradually. . . . Historically a customary norm of international law appears as a result of reiterated actions of states. The element of repetition constitutes the point of departure of its formation. In the majority of cases it is precisely the repetition of certain actions in analogous situations that leads to such practices becoming a rule of conduct. It is conceivable, however, for the element of repetition in some cases not to occur for the rule of conduct<sup>2</sup> to appear as a result of one precedent only.

and as to the time aspects of this development

. . . Duration, or in other words, the element of time, also plays an important role in the process of formation of a customary norm of international law. . . . The element of time does not in itself create a presumption in favor of the existence of a customary norm . . . Although in fact time plays a big part in the process . . . , juridically the element of time can not in itself have a decisive significance. Depending on circumstances, a customary norm may take time to develop but may also be formed in a short period of time.<sup>3</sup>

In relation to treaties as a source of obligation we see from Henkin that

Considered in themselves, and particularly in their inception, treaties, are, formally, a source of obligation rather than a source of law. . . . A statute is always, from its inception, law: a treaty may reflect, or lead to, law, but



particularly in its inception, is not, as such law. . . . In itself, the treaty and the law it contains only applies to the parties to it. True, where it reflects existing law, non-parties may conform to the same rules, but they do so by virtue of the rules of general law thus reflected in the treaty, not by virtue of the treaty itself. In that sense, the treaty may be an instrument in which the law is conveniently stated, and evidence of what it is, but it is still not itself the law--it is still<sup>4</sup> not a source of law but only evidence of it.

Professor Jonathan Charney of Vanderbilt University, in an address before the Duke University Law of the Sea Symposium in October 1982, addressed the problems of the U.S. if we remain outside of the Treaty.<sup>5</sup> In discussing the rules for the development of general international law he calls attention to the International Court of Justice decisions in the North Sea Continental Shelf Cases. This case is detailed in McDougal and Reisman.<sup>6</sup> One of the major opinions of this court came up in the context of the Law of the Sea. The question was whether or not the equidistance rule of the 1958 UNCLOS I, was a norm of international law applicable to states who are not a party to the Convention. The Court discussed how questions of this kind are to be evaluated.

. . . There are three ways which a rule found in an international agreement might be relevant to a search for general international law. First, the rule might be a codification of a preexisting norm of international law. In that circumstance one must refer to international practice outside of the agreement to determine whether or not the norm exists outside of the agreement. Second, the rule might serve the function of bringing

into existence a norm that is in the formative stages of development in international practice. Thus, the articulation of the norm in the agreement and the subscription to the norm by the parties to the agreement may provide the final elements needed to crystallize prior real world circumstances in order to give birth to a new norm of international law. Third, the government might develop a new norm of international law which once subscribed to by the state parties to the agreement might initiate a series of actions outside the agreement that would give rise to a general legal obligation.

The purpose of these extensive quotations is to provide the most vital and basic concepts of the international law, as viewed by the layman, to demonstrate that those who profess that the new Law of the Sea Treaty, with all of its provisions, will find its way into international law, have a most difficult task of demonstrating this. It surely is not impossible. However, part XI could never find its way into international law but it could create and develop some new norms outside of the economic aspects of deep seabed mining.

The United States has been accused of picking parts of the Treaty it likes and rejecting those not acceptable to it. The real issue is whether a treaty, specifically the Law of the Sea Treaty, once it acquires sufficient ratifications to enter into force among the ratifying states, automatically achieves some level of status, some binding force against all nations, including those states which have not ratified it.

Many Treaty supporters argue that the terms of the Treaty will become effective for all nations when it enters into force. The Group of 77 have been very vocal with this reasoning, as evidenced in the preceding chapter. It is true that many articles in the Treaty reflect existing general norms of international law and consequently only codify what has been the law for a period of time. There are other articles which do not reflect existing customary law and practice. They amount to an attempt to generate new law. As we have seen, this new law is only binding on those states which choose to accept and implement it, at least until such time as the level of recognition and implementation of those provisions is so extensive that it reflects evolving norms of general international practice as discussed at the beginning of this chapter.

In light of the principles of international law, the thrusts of the current United States strategy on the Law of the Sea, beyond our denial that the 1982 Treaty binds us in any way, appear to be two-fold. The United States will have to try to influence and direct the understanding and future course of customary law of the sea, and will have to enter into discussions and negotiations with appropriate nations with a view toward achieving understanding or agreement favorable to U.S. ocean interests.



What then are the issues as they relate to the deep seabed portions of the Treaty and transit passage through straits used for international navigation, with the issue in this case being whether these parts of the Treaty are viewed as customary law. The position of the United States about deep seabed mining as a right of the freedom of the high seas was already discussed at the opening of this chapter.

At issue, then, is the transit passage through straits used for international navigation. It is claimed by many that this is not customary law, but new law and therefore, applies only to those nations who sign the Treaty. The question is not the freedom of the high seas, but whether customary international law recognizes the basic rights and duties of transit passage as reflected in the Treaty, including the right of submerged transit and overflight. According to Rear Admiral Harlow, in an address at Duke University Law Symposium on the Law of the Sea, October 1982, he said that it was the intent of the major maritime powers on the point of transit on, over, and under the waters in question, that each of their proposals of draft language for straits relied on the phrase--'freedom of navigation' as being inclusive of submerged transit, ". . . it was the draft of the U.K. that was ultimately adopted into the composite text. The U.K., in submitting



this draft, made specific reference to the need 'to ensure that unrestricted navigation through those vital links in the world network of communications should remain available for use by the international community.'"<sup>8</sup>

The Admiral also mentions that on several occasions throughout the Conference's negotiating history countries attempted to eliminate the right of submerged transit from the straits regime. It is obvious that if the attempt to remove the right was at issue then the right existed.<sup>9</sup>

The argument about the "normal mode" of transit is again an old one but is a very valid concept. The normal mode for a submarine is, in fact, submerged where she can maneuver with great skill and ease since the hull design was to give the ship maximum under water maneuverability. Admiral Harlow states that there is no evidence in the negotiating history that the word normal was in any way meant to be restrictive.<sup>10</sup>

The leading military powers possessing nuclear powered submarines have been transiting the international straits submerged for many years. The 12 mile territorial sea now places the transit lanes inside a nations' territorial sea. The former pattern of submerged operations, as a function of that nations' strategic nuclear deterrence capabilities, requires undetected operations. The earlier pattern of submerged operation was common knowledge and the affected

nations, whose territorial seas were being used, had the legal opportunity to challenge the concept in court. This was not done and could, as a consequence, have established an accepted international norm. In any event, the official United States position on this matter is that, the absence of any specific reference to submerged navigation in straits, gives rise to the confirmation of the right.

. . . The term 'freedom of navigation' was carefully chosen by the original drafters of the straits provisions, as it carries over, except as explicitly restricted, the high seas connotation of the phrase into the transit passage regime.<sup>11</sup>

We must return to the question of the United States as being outside of the Treaty, and yet being a third party beneficiary of those non-seabed provisions acceptable to us. McDougal and Reisman quote the Vienna Convention on the Law of Treaties, in their discussions of The Conferment of Benefits or Imposition of Obligations Upon Third States in the Original Agreement. Article 36.CD of that discussion states

. . . A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.<sup>12</sup>

The argument, then, states that because the Treaty did not exclude any nations from its new law provisions, then the third party rights are, in effect, legally valid.

Additionally, the Treaty could not deny any nation its rights under currently acceptable international law norms nor can the Treaty cancel existing laws or norms.

This, then, leaves the United States outside of the Treaty, by choice, but with all rights intact under international law norms, and the beneficiary effects of any provisions of new law where exclusion has not actually been provided in the text.

The questions remain as to whether the United States would proceed under unilateral provisions of existing U.S. law, and engage in deep seabed mining on the freedom of the high seas concept, and how will the United States fare on the Straits passage issues of the transit passage provisions of the Treaty?

These questions will be answered in the conclusion to follow in the next and final chapter of this discussion.



## CHAPTER VI

### Conclusions

One of the areas of naval concern in the final version of the Treaty was that of straits passage. The Treaty provides for the creation of a new international legal right: transit passage. If not for the creation of the transit passage right, passage through straits falling within territorial waters would be governed by the provisions of innocent passage which has been a recognized norm of customary law for many years (supra, Chapter II). The transit passage articles explicitly provide for the passage of aircraft. No such passage is available for innocent passage. There is no submarine prohibition under transit passage. It is very probable that without the influence of the major naval powers no provisions for transit passage would exist in the final text of the Treaty. As we have mentioned, strait states have opposed the adoption of any but innocent passage rules. The important distinctions between innocent passage and transit passage are those of most concern to navies: submarine passage, overflight and military and intelligence activities. Ships and aircraft transiting these connecting points of the high seas may consider the provisions of the Treaty as a current international expression of their rights and responsibilities. The balance reflected in these provisions of the Treaty protect the



legal interests of both the international community and the coastal state. The practice that those provisions codify ensures that the routes between the high seas will remain free from unilateral obstruction while, at the same time, provide a workable remedy against any flag state encroachment of the residual rights of the strait state involved. It is impossible to accept that the international community would even consider administering two separate and distinct sets of rules governing navigation rights, one set for Treaty parties and a separate set for non-Treaty states.

It is to the best interests for the Treaty parties to acknowledge the third party rights of nations and include them in any law created by a unanimous acceptance of any new international law norm. The legal right is there and any attempt to deny it could lead to unnecessary legal entanglements. I am sure that the United States will conduct itself in the proper legal manner and in accordance with those issues already addressed in this discussion as it relates to transit passage and freedom of the seas. The United States, in conducting itself consistent with the non-seabed provisions of the treaty, is actually contributing to the shaping of customary law, so that choice provisions of the treaty that do not reflect a general practice accepted as law, will become such.

In relation to deep seabed mining this same concept is not valid since the opportunity does not exist. Activities under the Treaty can affect the legal interests of the United States only if they reflect customary law. As we have seen, Part XI creates a new international organization. The membership in this organization, as we have seen is by contractual obligation. We know from our discussion that customary international law must be formed outside of the Treaty (supra, 58). We have also seen that the treaty can not prevent independent development of customary law. As the customary law develops for deep seabed mining, as a function of the development of the mining, it is hoped that due regard will be given to the interests of other states who are operating under the exercise of the freedom of the seas.

I do not believe that the United States will engage in deep seabed mining on a unilateral basis. I do see the U.S. Mining companies operating in accordance with the Treaty but under a flag of convenience. If the United States were so vitally interested in self sufficiency in vital minerals found on the deep seabed, then the fight for better Treaty provisions in this area could have evolved over the years of negotiations.

The United States will, however, conduct deep seabed mining inside its' legal territorial limits coincidental with the development of the technology.

## NOTES

### Chapter I

<sup>1</sup>"U.S. Votes Against Law of the Sea," U.S. Department of State Bulletin, August 1982, p. 71.

<sup>2</sup>J.R. Botzum, ed., Ocean Science News (Washington: Nautilus Press, 1982), Vol. 24, No. 38.

<sup>3</sup>"U.S. Claims Right to Ocean Mining for 200 Miles," The Providence (Rhode Island) Journal, March 11, 1983, p. A-11.

### Chapter II

<sup>1</sup>Myres S. McDougal and William T. Burke, The Public Order of the Oceans (New Haven: Yale University Press, 1962), p. 1.

<sup>2</sup>Myres S. McDougal and Michael W. Reisman, International Law in Contemporary Perspective (Mineola, New York: The Foundation Press, 1981), p. 15-16.

<sup>3</sup>Hugo Grotius, The Freedom of the Seas, First published in 1608, revised in 1633, in Latin; translation by R. Magoffin; edited by J.S. Brown for the Carnegie Endowment for International Peace. (New York: Oxford University Press, 1916), p. 7.

<sup>4</sup>Morton A. Kaplan and Nicholas de B. Katzenbach, The Political Foundations of International Law (New York: John Wiley, 1961), p. 56-62.

<sup>5</sup>C. John Colombos, International Law of the Sea, 6th ed. (New York: McKay, 1967), p. 87.

<sup>6</sup>Tervo Kobayashi, The Anglo-Norwegian Fisheries Case of 1951 and the Changing Law of the Territorial Sea (Gainesville: University of Florida Press, 1965), p. 6.

<sup>7</sup>McDougal and Reisman, p. 16-17.

<sup>8</sup>"Proclamation Concerning United States Jurisdiction over Natural Resources in Coastal Areas and the High Seas," U.S. Department of State Bulletin, September 1945, p. 484-487.



<sup>9</sup>  
Ibid.

<sup>10</sup> R.P. Anand, Legal Regime of the Sea-Bed and the Developing Countries (India: Thomson Press, 1975), p. 32-37.

<sup>11</sup> Carl M. Franklin, U.S. Naval War College International Law Studies, 1959-1960 (Washington: U.S. Govt. Print. Off., 1961), p. 1.

<sup>12</sup> The Law of the Sea, The Final Act and Annexes of the United Nations Conference on the Law of the Sea, Geneva, 1958 (London: The Society for Comparative Legislation and International Law, 1958), p. 1-33.

<sup>13</sup>  
Ibid.

<sup>14</sup> Franklin, p. 306.

<sup>15</sup> Yearbook of the United Nations, 1960 (New York: United Nations Office of Public Information, 1960), p. 542.

<sup>16</sup> Barry Buzan, "The Coastal State Movement," Toward a New International Marine Order, Finn Laurensen, ed., (The Hague: Martinus Nijhoff, 1982), p. 15-22.

<sup>17</sup> Euripides L. Evriviads, "The Third World's Approach to the Deep Seabed," Ocean Development and International Law, Vol. II, No. 3-4, Daniel S. Cheever, ed., (New York: Crane Russak, 1982), p. 201-240.

<sup>18</sup> Lawrence Juda, "UNCLOS III and the New International Economic Order," Ocean Development and International Law, Vol. 7, No. 3-4, Daniel S. Cheever, ed., (New York: Crane Russak, 1979), p. 222.

<sup>19</sup> W. Scott Burke and Frank S. Brokaw, "Law at Sea," Policy Review, 20, John O'Sullivan, ed., (Washington: The Heritage Foundation, 1982), p. 71-82.

<sup>20</sup> Ted L. McDorman, "Reservations and the Law of the Sea Treaty," Journal of Maritime Law and Commerce, Vol. 13, No. 4, Nicholas J. Healy, ed., (Baltimore: Jefferson Law Book, 1982), p. 481-519.

<sup>21</sup> J.R.V. Prescott, The Political Geography of the Oceans (New York: Halsted Press, 1975), p. 222-226.

<sup>22</sup>Ronald St. John Macdonald et al., The International Law and Policy of Human Welfare (The Netherlands: Sijtkoff and Noordhoff, 1978), p. 194.

<sup>23</sup>Jens Evensen, "UNCLOS: Origin and Process of Negotiation," Toward a New International Marine Order, Finn Laursen, ed., (The Hague: Martinus Nijhoff, 1982), p. 8.

<sup>24</sup>Macdonald, p. 187.

### Chapter III

<sup>1</sup>U.S. Department of State Bulletin, June 15, 1970, p. 737-741.

<sup>2</sup>"United States Policy for the Seabed," Statements by President Nixon and Under Secretary Richardson, U.S. Department of State Bulletin, June 1970, p. 737-741.

<sup>3</sup>Finn Laursen, ed., "The Law of the Sea and International Security: Aspects of Superpower Policy," Toward a New International Marine Order (The Hague: Martinus Nijhoff, 1982), p. 80.

<sup>4</sup>R.P. Anand, Legal Regime of the Sea-Bed and the Developing Countries (India: Thomson Press, 1975), p. 117-147.

<sup>5</sup>Lawrence Juda, "UNCLOS III and the New International Economic Order," Ocean Development and International Law, Vol. 7, No. 3-4, Daniel S. Cheever, ed., (New York: Crane Russak, 1979), p. 247-248.

<sup>6</sup>T.O. Elias, New Horizons in International Law (The Netherlands: Sijthoff and Noordhoff, 1979), p. 55-66.

<sup>7</sup>Henry Kissinger, "International Law, World Order, and Human Progress," U.S. Department of State Bulletin, September 1975, p. 353-362.

<sup>8</sup>Henry Kissinger, "The Law of the Sea: A Test of International Cooperation," U.S. Department of State Bulletin, April 1976, p. 540.

<sup>9</sup>Ibid.

<sup>10</sup>Ibid., p. 541.

<sup>11</sup>Henry Kissinger, Secretary Kissinger Remarks at a Reception. U.S. Department of State Bulletin, September 1976, p. 397-399.

<sup>12</sup>Ibid., p. 398.

<sup>13</sup>Ibid., p. 399.

<sup>14</sup>U.S. Congress, House, Fishery Conservation and Management Act of 1976, Pub. L. 94-265, 94th Congress, 2d sess., 1976 H.R. 200, p. 332.

<sup>15</sup>Ibid.

<sup>16</sup>Ibid., p. 333.

<sup>17</sup>"Deep Seabed Hard Mineral Resources Act," U.S. Department of State Bulletin, October 1980, p. 73-74.

<sup>18</sup>William C. Brewer, Jr., "Deep Seabed Mining: Can an Acceptable Regime Ever Be Formed," Ocean Development and International Law, Vol. II, No. 1/2, Daniel S. Cheever, ed., (New York: Crane Russak, 1982), p. 34.

#### Chapter IV

<sup>1</sup>Elliot L. Richardson, "The Politics of the Law of the Sea," Ocean Development and International Law, Vol. II, No. 1/2, Daniel S. Cheever, ed., (New York: Crane Russak, 1982), p. 10.

<sup>2</sup>U.S. Congress, Senate, Committee of Foreign Relations, Subcommittee on Arms Control, Oceans, International Operations and Environment, Law of the Sea Negotiations, Hearing (Washington: U.S. Govt. Print. Off., 1981), p. 1.

<sup>3</sup>U.S. Congress, House, Committee on Foreign Affairs, U.S. Policy and the Third Nations Conference on the Law of the Sea, Hearing (Washington: U.S. Govt. Print. Off., 1981), pt. 1, p. 3-7.

<sup>4</sup>Ibid., p. 5-6.

<sup>5</sup>Ronald Regan, "U.S. Policy and the Law of the Sea," U.S. Department of State Bulletin, March 1982, p. 54-55.

<sup>6</sup>The Comptroller General, Report to the Congress, Impediments to U.S. Involvement in Deep Ocean Mining Can be Overcome, February 3, 1982, p. 5.



<sup>7</sup>James L. Malone, Statement to an informal meeting convened by the President of the Conference and the Chairman of the First Committee; 13 August, (NOT for public dissemination), 1981, p. 3.

<sup>8</sup>Theodore G. Kronmiller, Unpublished statement before the Marine Technology Society, 8 September 1981.

<sup>9</sup>Inan UL Hague, Unpublished statement before the informal Plenary of the Third United Nations Conference on the Law of the Sea, 10 August 1981, p. 7-10.

<sup>10</sup>Ibid., p. 11.

<sup>11</sup>Inan UL Hague, Unpublished statement before the Plenary of the Third United Nations Conference on the Law of the Sea, 17 August 1981, p. 1.

<sup>12</sup>Tullio Treves, "The Adoption of the Law of the Sea Convention," Marine Policy (London: Butterworth, January 1983, p. 3-13.

<sup>13</sup>Ibid., p. 6.

#### Chapter V

<sup>1</sup>L. Oppenheim, International Law A Treatise, Vol. 1: Peace (London, Longmans, Green, 1957), p. 25.

<sup>2</sup>Myres S. McDougal and Michael W. Reisman, International Law in Contemporary Perspective (New York: The Foundation Press, 1981), p. 86-87.

<sup>3</sup>Ibid.

<sup>4</sup>Louis Henkin et. al., International Law (St. Paul, Minnesota: West Publishing, 1980), p. 69-70.

<sup>5</sup>Jonathan I. Charney, Unpublished paper delivered at Duke University Law of the Sea Symposium, 29 October 1982.

<sup>6</sup>McDougal and Reisman, p. 553-589.

<sup>7</sup>Charney, p. 4.

<sup>8</sup>Bruce A. Harlow, Assistant Judge Advocate General of the Navy and Joint Chiefs of Staff Representative for Law of the Sea Matters, unpublished paper delivered at Duke University Law of the Sea Symposium, October 1982, p. 13.



<sup>9</sup>Ibid., p. 14-15.

<sup>10</sup>Ibid.

<sup>11</sup>Ibid., p. 12.

<sup>12</sup>McDougal and Reisman, p. 1220.

## BIBLIOGRAPHY

- Aldrich, George H. "Law of the Sea." U.S. Department of State Bulletin, February 1981, p. 56-59.
- Anand, R.P. Legal Regime of the Sea-Bed and the Developing Countries. India: Thomson Press, 1975.
- Anderson, E.W. "The Need to Safeguard the Supply of Strategic Minerals to the West." Global Collective Security in the 1980s. London: Foreign Affairs Publishing, 1982, p. 67-79.
- Barkenbus, Jack N. Deep Seabed Resources: Politics and Technology. New York: Free Press, 1979.
- Biggs, Gonzalo. "Deep Seabed Mining and Unilateral Legislation." Ocean Development and International Law, no. 3, 1980, p. 223-257.
- Black, Cyril E. and Falk, Richard. The Future of the International Legal Order: Retrospect and Prospect. World Order Studies Program Occasional Paper No. 11. Princeton: University Press, 1982.
- Botzum, J.R., ed. Ocean Science News. Washington: Nautilus Press, 1982.
- Brewer, William C. Jr. "Deep Seabed Mining: Can an Acceptable Regime Ever Be Formed." Ocean Development and International Law, Vol. II, No. 1/2, Daniel S. Cheever, ed. New York: Crane Russak, 1982, p. 25-67.
- Burke, W. Scott and Brokaw, Frank S. "Law at Sea." Policy Review, 20, John O'Sullivan, ed. Washington: The Heritage Foundation, 1982, p. 71-82.
- Buzan, Barry. "The Coastal State Movements." Finn Laursen, ed. Toward a New International Marine Order. The Hague: Martinus Nijhoff, 1982, p. 15-22.
- Chapman, Stephen. "Underwater Plunder." The New Republic, 21 April 1982, p. 17-20.
- Charney, Jonathan I. Unpublished paper delivered at Duke University Law of the Sea Symposium, 20 October 1982.
- Colombos, C. John. International Law of the Sea. New York: McKay, Co., 1967.

The Comptroller General, Report to the Congress, Impediments to U.S. Involvement in Deep Ocean Mining Can Be Overcome. February 3, 1982, p. 1-57.

"Deep Seabed Hard Mineral Resources Act." U.S. Department of State Bulletin, October 1980, p. 73-74.

Elias, T.O. New Horizons in International Law. The Netherlands: Sijthoff and Noordhoff, 1979, p. 55-66.

Evensen, Jens. "UNCLOS: Origin and Process of Negotiation." Toward a New International Marine Order, Finn Laursen, ed., The Hague: Martinus Nijhoff, 1982, p. 1-14.

Evriviads, Euripides L. "The Third World's Approach to the Deep Seabed." Ocean Development and International Law, Vol. II, No. 3-4, Daniel S. Cheever, ed. New York: Crane Russak, 1982, p. 201-240.

Franklin, Carl M. U.S. Naval War College International Law Studies, 1959-1960. Washington: U.S. Govt. Print. Off., 1961.

Friedheim, Robert L. and Brown, Robert E. "Neglected Issues at the Third United Nations Law of the Sea Conference." Ocean Management, December 1979, p. 309-339.

Grotius, Hugo. The Freedom of the Seas. New York: Oxford University Press, 1916.

Hague, Inan UL. Unpublished statement before the informal Plenary of the Third United Nations Conference on the Law of the Sea, 10 August 1981.

\_\_\_\_\_. Unpublished statement before the informal Plenary of the Third United Nations Conference on the Law of the Sea, 17 August 1981.

Harlow, Bruce A. Assistant Judge Advocate General of the Navy and Joint Chiefs of Staff Representative for Law of the Sea Matters, unpublished paper delivered at Duke University Law of the Sea Symposium, October 1982.

Hawkins, William R. "Law of the Sea: How to Give Away Your Future." National Review, 16 April 1982, p. 410, 412-414.



Henkin, Louis; Pugh, Richard C.; Schachter, Oscar; and Smit, Hans. International Law. St. Paul, Minnesota: West Publishing, 1980, p. 1-113.

Hollick, Ann L. U.S. Foreign Policy and the Law of the Sea. Princeton, NJ: Princeton University Press, 1981.

Jenisch, Uwe. "The U.N. Law of the Sea Conference Before Its 11th Session." Aussenpolitik, V. 33, no. 1, 1982, p. 59-73.

Jessup, Philip C. The Use of International Law. The Thomas M. Cooley Lectures, Ann Arbor: University of Michigan, 1959.

Jones, Erin Bain. Law of the Sea. Dallas: Southern Methodist University Press, 1972.

Juda, Lawrence. "UNCLOS III and the New International Economic Order." Ocean Development and International Law, Vol. 7, No. 3-4, Daniel S. Cheever, ed. New York: Crane Russak, 1979, p. 221-255.

\_\_\_\_\_. "United States Votes 'No' on New Law of the Sea-Now What?" Maritimes, November 1982, p. 1-2.

Kaplan, Morton A. and Katzenbach, Nicholas deB. The Political Foundations of International Law. New York: John Wiley, 1961.

Kissinger, Henry. "International Law, World Order, and Human Progress." U.S. Department of State Bulletin, September 1975, Vol. LXXIII, No. 1889, p. 353-362.

\_\_\_\_\_. "The Law of the Sea: A Test of International Cooperation." U.S. Department of State Bulletin, April 1976, Vol. LXXIV, No. 1922, p. 533-542.

\_\_\_\_\_. Remarks at a Reception. U.S. Department of State Bulletin, September 1976, Vol. LXXV, No. 1944, p. 397-399.

Knox, I.W., Captain, RAN. "Law of the Sea-Political, Economic and Strategic Implications for Australia." Seaford House Papers 1979, Arthur Peers, ed. Seaford House, 1979, p. 130-147.



- Kobayaski, Tervo. The Anglo-Norwegian Fisheries Case of 1951 and the Chaning Law of the Territorial Sea. Gainesville: University of Florida Press, 1965.
- Kronmiller, Theodore G. Unpublished statement before the Marine Technology Society, 8 September 1981.
- Laursen, Finn, ed. Toward a New International Marine Order. The Hague: Martinus Nijhoff, 1982.
- The Law of the Sea. The Final Act and Annexes of the United Nations Conference on the Law of the Sea, Geneva. London: The Society for Comparative Legislation and International Law, 1958, p. 1-33.
- Lehman, John. "The Law of the Sea." Defense 82. March 1982, p. 1-9.
- Levi, Werner. Contemporary International Law. Boulder, Colorado: Westview Press, 1979.
- Macdonald, Malcolm H. et al. The Rule of Law, Arthur L. Harding, ed. Dallas: Southern Methodist Univiersity Press, 1961.
- Macdonald, Ronald St. John. The International Law and Policy of Human Welfare. The Netherlands: Sijthoff and Noordhoff, 1978.
- Malone, James L. Statement to an informal meeting convened by the President of the Conference and the Chairman of the First Committee; 13 August (NOT for public dissemination), 1981.
- Manley, Robert H. "Developing National Imperatives for a New Law of the Sea: UNCLOS I and II as Stages in the International Policy Process." Ocean Development and International Law, No. 1/2, 1979, p. 9-18.
- McDorman, Ted L. "Reservations and the Law of the Sea Treaty." Journal of Maritime Law and Commerce, Vol. 13, No. 4, Nicholas J. Healy, ed. Baltimore: Jefferson Law Book, 1982, p. 481-519.
- McDougal, Myres S. and Burke, William T. The Public Order of the Oceans. New Haven: Yale University Press, 1962.

- \_\_\_\_\_ and Reisman, Michael W. International Law in Contemporary Perspective. New York: The Foundation Press, 1981.
- Middendorf, Hon. William J. "U.S. Policy Towards Its Dependence Upon External Mineral and Energy Resources." Global Collective Security in the 1980s. London: Foreign Affairs Publishing, 1982, p. 80-90.
- Oppenheim, L. International Law A Treatise, Vol. 1: Peace, London: Longmans, Green, 1957, p. 1-114.
- Oxman, Bernard H. "The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)." American Journal of International Law, O. Schacter and L. Henkin, eds. Vol. 76, No. 1. Lancaster, PA: Lancaster Press, January 1982, p. 1-23.
- Prescott, J.R.V. The Political Geography of the Oceans. New York: Halsted Press, 1975.
- "Proclamations Concerning United States Jurisdiction over Natural Resources in Coastal Areas and the High Seas." U.S. Department of State Bulletin, September 1945, p. 484-487.
- Ratiner, Leigh S. "The Law of the Sea: A Crossroads for American Foreign Policy." Foreign Affairs, Summer 1982, p. 1006-1021.
- Reagan, Ronald. "U.S. Policy and the Law of the Sea." U.S. Department of State Bulletin, March 1982, p. 54-55.
- Richardson, Elliot L. "Law of the Sea." Naval War College Review, May-June 1979, p. 3-10.
- \_\_\_\_\_. "The Politics of the Law of the Sea." Ocean Development and International Law, Vol. II, No. 1/2, Daniel S. Cheever, ed. New York: Crane Russak, 1982, p. 9-23.
- Starron, John E. and Hymson, Patricia K. eds. The Economic Basis of Pacific Security. National Defense University Proceedings of the Third Pacific Symposium, 1982, Washington: Fort Lesley J. McNair, 1982.
- Treves, Tullio. "The Adoption of the Law of the Sea Convention." Marine Policy. London: Butterworth, January 1983, p. 3-13.

- "United States Policy for the Seabed," Statements by President Nixon and Under Secretary Richardson. U.S. Department of State Bulletin, June 1970, Vol. LXII, No. 1616, p. 737-471.
- "U.S. Claims Right to Ocean Mining for 200 Miles." The Providence (Rhode Island) Journal, March 11, 1982, p. A-11.
- U.S. Congress, Congressional Budget Office, Special Study Cobalt: Policy Options for a Strategic Mineral. Washington: U.S. Govt. Print. Off., September 1982.
- \_\_\_\_\_. House. Committee on Foreign Affairs. U.S. Policy and the Third United Nations Conference on the Law of Sea. Washington: U.S. Govt. Print. Off., 1981.
- \_\_\_\_\_. \_\_\_\_\_ . Fishery Conservation and Management Act of 1976. Pub. L. 94-265, 94th Cong., 2d sess., H.R. 200.
- \_\_\_\_\_. Senate Committee on Foreign Relations, Subcommittee on Arms Control, Oceans, International Operations and Environment. Law of the Sea Negotiations. Hearing. Washington: U.S. Govt. Print. Off., 1981.
- U.S. Department of State Bulletin, June 15, 1970, p. 737-741.
- "U.S. Votes Against Law of the Sea Treaty." U.S. Department of State Bulletin, August 1982, p. 71.
- Wiegley, Roger D. "Law and Conflict at Sea." Naval War College Review, January-February 1980, p. 68-77.
- Wissing, Robert G. ed. International Relations and the Future of Ocean Space. Columbia: University of South Carolina Press, 1974.
- Yearbook of the United Nations, 1960. New York: United Nations Office of Public Information, 1960.